A

Tang Kwor Ham & Ors v Pengurus Danaharta Nasional Bhd & Ors

B HIGH COURT (MELAKA) — JUDICIAL REVIEW NO 13–2 OF 2002
LOW HOP BING J
16 JUNE 2006

C *Civil Procedure — Abuse of process — Double applications for recusal of judge — Whether an abuse of the process of court — Whether such applications ought to be struck out*

D *Civil Procedure — Appeal — Appeal to Court of Appeal — Jurisdiction to hear and determine civil appeals — Whether such jurisdiction includes the making of such further or other orders as the case requires*

E *Civil Procedure — Court — Jurisdiction — High Court — Co-ordinate jurisdiction, legal effects of — Whether one High Court judge may direct another High Court judge*

Civil Procedure — Judge — Application to recuse judge — Double applications for recusal — Whether such applications would require the judge to decide on his own partiality or impartiality — Whether contrary to natural justice

F

Civil Procedure — Judge — Chief Judge — Distribution of business — Directions of Chief Judge relating to the distribution of business among judges — Whether such power of an administrative or judicial nature — Courts of Judicature Act 1964 s 20

G

The applicants had earlier applied for leave for judicial review of a certain proposal put up by the respondents. Low Hop Bing J (Low J) in the High Court had refused the application and the applicants appealed to the Court of Appeal. The Court of
H Appeal by a majority, allowed the application and ordered the applicants to file their substantive motion. The motions were filed and called up for hearing on 5 December 2005 before Low J again. Low J directed the parties to file their affidavits and fixed hearing of the substantive motion on 1 June 2006. However, before the hearing counsel for the applicants filed encl 33 for, inter alia, an order that Low J be recused
I from hearing the substantive motion. Enclosure 33 came up for hearing before Low J once again. At the hearing, applicants' counsel refused several alternatives put forward by Low J and instead made an oral application that Low J also recuse himself from hearing encl 33. There were thus double recusal applications, one made in respect of the substantive motion — encl 33 and the other — the oral application in relation to encl 33. Counsel for the applicants suggested that Low J direct, find or get another

judge from another state to hear the double recusal applications and the substantive motion.

Held, striking out both recusal applications as an abuse of court's process:

(1) In the Malaysian High Courts, all judges, including judicial commissioners, are vested with co-ordinate jurisdiction. One of the legal effects of this co-ordinate jurisdiction is that judge A has no jurisdiction to direct, find or get judge B, less so from another state, to hear a cause or matter which has been filed and registered for hearing before judge A. In the same vein, judge B has no jurisdiction to make an order which is intended to recuse judge A from hearing any matter which has been filed and registered for hearing before judge A. This principle applies whether the judges are resident in the same state or different states. Only the Chief Judge is conferred with the power and jurisdiction relating to the distribution of business among the judges. That power is regulated by s 20 of the Courts of Judicature Act 1964 (see para 17).

(2) The directions given by the Chief Judge pertaining to distribution under s 20 is of an administrative nature as opposed to a judicial order. Such administrative direction is generally effected where there has been no appeal to the Court of Appeal. Where a judgment or order from the High Court has proceeded by way of appeal to the Court of Appeal, then s 20 would be inapplicable. Instead ss 67(1), 69(2) and (4) would apply (see paras 20–21).

(3) Applying ss 67(1), 69(1) and (4) to an appeal before the Court of Appeal, the order which the Court of Appeal makes pursuant thereto is a judicial order. It is within the jurisdiction of the Court of Appeal under s 69(4) to give directions upon the determination of the appeal before it. Such jurisdiction includes the making of such further or other orders as the case requires, eg, the jurisdiction to give directions as to whether, given the factual background in the instant case, another judge or Low J should hear the substantive motion. This direction may be given by the Court of Appeal at the time of disposing of the appeal before it or subsequently by way of additional direction or clarification (see para 24).

(4) In the instant case, there could be no doubt that it was beyond Low J's jurisdiction to make an order directing, finding or getting another judge, either in the same state or from another state, to hear the double recusal applications and the substantive motion. In the instant case, it was only fitting and proper for the applicants to seek an order, direction or clarification from the same panel of the Court of Appeal as to which particular judge should hear the substantive motion (see ara 25).

(5) In the instant case, the oral application sought to recuse Low J from hearing encl (33), and encl (33) in turn sought to recuse him from hearing the substantive motion. In the double recusal applications, Low J had been made the subject matter, in which the order sought to be made by him, ie either to recuse himself or to refuse to recuse himself, would require him to be a judge of his own cause. In other words, Low J would have to be a judge of his own

partiality or impartiality. That would contravene one of the two fundamental pillars of natural justice — *nemo debet esse judex in propria causa* (no one should be a judge in his own cause) (see para 30).

(6) The double recusal applications were obvious illustrations of abuses of the process of the court, and such abuses are capable of being struck out (see para 36). Order 92 r 4 of the RHC expressly provides for the inherent powers of the High Court to deal with an abuse of the process of the court (see para 38). The double recusal applications, being abuses of the process of court ought therefore to be struck out (see para 39).

[Bahasa Malaysia summary

Pemohon-pemohon telah sebelum ini memohon kebenaran untuk semakan kehakiman tentang satu cadangan tertentu yang dikemukakan oleh responden-responden. Low Hop Bing H (Low H) di Mahkamah Tinggi telah menolak permohonan tersebut dan pemohon-pemohon telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan melalui satu majoriti, telah membenarkan permohonan tersebut dan memerintahkan pemohon-pemohon memfailkan usul substantif mereka. Usul-usul tersebut telah difailkan dan dipanggil untuk didengar pada 5 Disember 2005 di hadapan Low H sekali lagi. Low H telah mengarahkan pihak-pihak memfailkan afidavit-afidavit mereka dan menetapkan perbicaraan usul substantif itu pada 1 Jun 2006. Bagaimanapun, sebelum perbicaraan itu peguam bagi pihak pemohon-pemohon telah memfailkan lampiran 33 untuk, antara lain, satu perintah agar Low H menarik diri daripada mendengar usul substantif itu. Lampiran 33 didengar di hadapan Low H sekali lagi. Semasa perbicaraan, peguam pemohon-pemohon menolak beberapa alternatif yang dikemukakan oleh Low H dan sebaliknya membuat satu permohonan lisan agar Low H sendiri menarik diri daripada mendengar lampiran 33. Oleh itu terdapat dua permohonan penarikan diri, satu dibuat berkaitan usul substantif itu — lampiran 33 dan satu lagi — permohonan lisan berkaitan lampiran 33. Peguam bagi pihak pemohon-pemohon mencadangkan agar Low H mengarahkan, mencari atau mendapatkan hakim lain daripada negeri lain untuk mendengar dua permohonan penarikan diri dan usul substantif itu.

Diputuskan, membatalkan kedua-dua permohonan penarikan diri tersebut sebagai penyalahgunaan proses mahkamah:

(1) Di Mahkamah-mahkamah Tinggi Malaysia, semua hakim, termasuklah pesuruhjaya kehakiman, diberikan bidang kuasa setara. Salah satu kesan bidang kuasa setara ini adalah hakim A tidak mempunyai bidang kuasa untuk mengarah, mencari atau mendapatkan hakim B, jauh sekali daripada negeri lain, untuk mendengar satu kausa atau perkara yang telah difailkan dan didaftarkan untuk didengar di hadapan hakim tersebut. Begitu juga, hakim B tidak mempunyai bidang kuasa untuk membuat satu perintah yang diniatkan untuk menarik diri hakim A daripada mendengar apa-apa perkara yang telah difailkan dan didaftarkan untuk didengar di hadapan hakim A. Prinsip ini terpakai sama ada hakim-hakim tersebut menetap dalam negeri yang sama atau berbeza. Hanya Hakim Besar diberikan kuasa dan bidang kuasa berkaitan

pengagihan sedemikian antara hakim-hakim tersebut. Kuasa tersebut dikawal oleh s 20 Akta Mahkamah Kehakiman 1964 (lihat perenggan 17). A

(2) Arahan-arahan yang diberikan oleh Hakim Besar berhubung pengagihan di bawah s 20 adalah bersifat pentadbiran dan bukan satu perintah kehakiman. Arahan pentadbiran sedemikian secara amnya dilaksanakan di mana tiada rayuan ke Mahkamah Rayuan. Di mana satu penghakiman atau perintah daripada Mahkamah Tinggi telah dimulakan melalui rayuan ke Mahkamah Rayuan, maka s 20 tidak boleh terpakai. Sebaliknya ss 67(1), 69(2) dan (4) akan terpakai (lihat perenggan 20–21). B

(3) Dengan menggunakan ss 67(1), 69(1) dan (4) kepada rayuan di hadapan Mahkamah Rayuan, perintah yang dibuat oleh Mahkamah Rayuan menurutnya adalah satu perintah kehakiman. Ia dalam bidang kuasa Mahkamah Rayuan di bawah s 69(4) untuk memberikan arahan untuk menentukan rayuan di hadapannya. Bidang kuasa sedemikian termasuklah membuat perintah-perintah selanjutnya dan yang lain sepertimana kes tersebut menghendaki, contohnya, bidang kuasa untuk memberikan arahan berhubung sama ada, berdasarkan latar belakang faktual dalam kes semasa, hakim selain daripada Low H patut mendengar usul substantif tersebut. Arahan ini boleh diberikan oleh Mahkamah Rayuan semasa mendengar rayuan itu di hadapannya atau berikutnya melalui arahan atau penjelasan tambahan (lihat perenggan 24). C D E

(4) Dalam kes semasa, tiada keraguan yang melebihi bidang kuasa Low H untuk membuat satu perintah mengarah, mencari atau mendapatkan hakim lain, sama ada dalam negeri yang sama atau negeri yang lain, untuk mendengar kedua-dua permohonan penarikan diri dan usul substantif itu. Dalam kes semasa, ia hanya sesuai dan betul untuk pemohon-pemohon memohon satu perintah, arahan atau penjelasan daripada panel yang sama di Mahkamah Rayuan berhubung hakim tertentu yang mana patut mendengar usul substantif tersebut (lihat perenggan 25). F

(5) Dalam kes semasa, permohonan lisan tersebut memohon agar Low H menarik diri daripada mendengar lampiran (33), dan lampiran (33) pula memohon untuk menarik dirinya daripada mendengar usul substantif itu. Dalam permohonan penarikan diri berganda itu, Low H telah menjadi perkara pokok, yang mana perintah dipohon dibuat olehnya, iaitu sama ada menarik diri beliau atau menolak untuk menarik diri beliau sendiri, yang menghendaki beliau menjadi hakim terhadap akibatnya sendiri. Dalam erti kata lain, Low H perlu menjadi hakimnya sendiri yang berat sebelah atau tidak. Ini bertentangan dengan salah satu daripada dua tiang keadilan asasi — *nemo debet esse judex in propria causa* (no one should be a judge in his own cause) (lihat perenggan 30). G H I

(6) Permohonan penarikan diri berganda itu adalah ilustrasi nyata penyalahgunaan proses mahkamah, dan penyalahgunaan sedemikian boleh dibatalkan (lihat perenggan 36). Aturan 92 k 4 KMT dengan jelas memperuntukkan kuasa-kuasa sedia ada Mahkamah Tinggi untuk menangani penyalahgunaan

proses mahkamah (lihat perenggan 38). Permohonan penarikan diri berganda itu, yang merupakan penyalahgunaan proses mahkamah patut dibatalkan (lihat perenggan 39).]

Notes

For a case on application to recuse judge, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 3362.

For cases on abuse of process generally, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 8–18.

For cases on appeal to the Court of Appeal, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 676-679.

For cases on judges generally, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3360–3370.

For cases on jurisdiction of court, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2007–2009.

Cases referred to

Amanah Finance Malaysia Berhad v Aura Vista Sdn Bhd & Ors [2000] 5 CLJ 229 (refd)

Assahari bin Daud v Meriam bte Ishak & Ors [2005] 3 MLJ 143 (refd)

Bumicrystal Technology (M) Sdn Bhd v Rowstead Systems Sdn Bhd [2004] 6 MLJ 169 (refd)

Chong Siew Choong v PP [1996] 5 MLJ 65 (refd)

Dato" Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293 (refd)

Her Majesty's Attorney-General v Felling [2006] 1 FLR 93 QBD (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (refd)

Lee Chan Leong v Jurutera Konsultant (SEA) Sdn Bhd & Ors [2002] 3 MLJ 718 (refd)

Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710 (refd)

Malacca Securities Sdn Bhd v Lake Yu [1999] 6 MLJ 112 (refd)

Menara Panglobal Sdn Bhd v Arokianathan Sivapiragasam [2006] 3 MLJ 493 (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, Proposed Intervenors) [2004] 3 MLJ 301 (refd)

PP v Miswadi Radol & Ors [1996] 3 CLJ 763 (refd)

Paruvathy a/l Palany v Sathiasealan a/l Govindasamy [1999] 5 MLJ 151 (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)

Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132 (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2003] 4 MLJ 332 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 20, 67(1), 69(2), (4)
Rules of the High Court 1980 O 18 r 19, O 53 r 3, O 92 r 4

Lim Whei Chun (Lim Whei Chun) for the applicant.
Sathya Kumardas (Shearn Delamore & Co) for the first respondent.

SM Shanmugam (Lee Hishammuddin Allen & Gledhill) for the second, third and fourth respondents.

S Sivam (Thangaraj & Associates) for the fifth respondent.

Low Hop Bing J:

APPLICATION

[1] Before me is the notice of motion in encl (33) filed by applicants 2 and 3 (collectively, 'the applicants') seeking the following reliefs:

(1) that I be recused from hearing the substantive notice of motion in encl (23) ('the substantive motion') seeking, inter alia, certiorari;

(2) that respondents 1 to 5, jointly and severally, pay to the applicants all the costs in encl (33); and

(3) such other reliefs as the court deems fit.

GROUNDS OF APPLICATION

[2] As closely as possible, I shall adhere to the gist of the grounds stated by the applicants' solicitors in encl (33). These grounds are:

(1) I have in my judgment in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332 decided as follows (at p 343):

> In my view, having regard to the factual background as alluded to above, as apparent from the affidavits and statement of the applicants, I hold that in relation to this application for judicial review, there is no arguable case.

(2) I have personal (own or self) interest in that the success of the substantive motion would constitute a 'repudiation of my judgment; conversely its failure (on the basis of no arguable case) would constitute a vindication of my judgment;

(3) I have a 'conflict of interests' in that my personal (own or self) interest stated in ground (2) above is in conflict with the applicants" interest (in the success of the substantive motion);

(4) Under the law, I am automatically disqualified or recused from hearing the substantive motion;

(5) Alternatively, there is 'a real danger of bias' on my part in the sense that I might unfairly regard with disfavour the case of the applicants to the issue under consideration; and

(6) A 'fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility' that I am biased; or alternatively 'give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public'.

[3] The affidavit in support (encl (34)) was affirmed by deponent Tang Sheit Fun (applicant 3) who in paras 3 to 5 thereof had parroted all the grounds contained in encl (33), while paras 6 and 7 thereof referred to my judgment and, on appeal, the judgments of the Court of Appeal, in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60, CA.

FACTUAL BACKGROUND

[4] A reference to an order and a rule hereinafter is a reference to that order and rule in the Rules of the High Court 1980 unless otherwise stated.

[5] Pursuant to the application in encl (11) filed by, inter alia, the applicants under O 53 r 3, seeking leave for judicial review, I have delivered my judgment against which the applicants have filed an appeal ('the appeal').

[6] The Court of Appeal in a majority judgment (2:1) allowed the applicants" appeal with costs. In setting aside all the orders contained in my judgment, Gopal Sri Ram JCA (with the concurrence of Hashim Yusoff JCA) in para 64 of the majority judgment at pp 966 and 967 made the following specific order:

> I would remit this matter to the court below so that it may be proceeded with in the ordinary way. The applicants shall file their substantive motion within 14 days from today and serve a copy of the same (after extraction) on the respondents. We will now fix this matter for mention before the High Court at Melaka on a mutually convenient date with a direction to expeditiously dispose of this matter.

[7] Zaleha Zahari JCA in delivering the dissenting judgment in para 103 at p 976 held that I was right in concluding that there was no arguable case. In para 105 thereof her Ladyship dismissed the applicants" appeal with costs.

[8] Pursuant to the majority judgment, the applicants had on 7 November 2005 filed the substantive motion which had been fixed for hearing on 5 December 2005.

[9] On 5 December 2005, when the matter was called before me, all parties were represented by their respective learned counsel, including Miss Amy Yeo who mentioned on behalf of the applicants' solicitor. I directed the parties to file their respective affidavits according to specific time frame. Hearing of the substantive motion was then fixed for 1 June 2006.

[10] Before the substantive motion could be heard on 1 Jun 2006, the applicants' solicitor and learned counsel Mr Lim Whei Chun ('applicants' counsel') filed encl (33), supported by encl (34).

[11] When encl (33) came up for hearing, I was of the view that it would be fair and just for the applicants and/or their counsel to be given the opportunity of considering some other more appropriate and practical options. Hence, before the

hearing of encl (33), I had offered to the applicants' counsel the following three options:

(1) To withdraw encl (33) and make an application to the same panel of learned judges in the Court of Appeal for an order as to whether another High Court judge or I should hear the substantive motion;

(2) To withdraw encl (33) and proceed with the hearing of the substantive motion before me; or

(3) To proceed with the hearing of encl (33) before me.

[12] I requested the applicants' counsel to take half an hour or so in order to arrive at a mature consideration and decision. However, he instantly elected to decline all the three options. Meanwhile, he made an oral application, for the purpose of seeking an order from me that I also recuse myself from hearing encl (33).

[13] The oral application and encl (33) coupled with the aforesaid grounds are collectively referred to hereinafter as 'the double recusal applications'.

SECTION 20 COURTS OF JUDICATURE ACT 1964

[14] In attempting to seek an order from me that I recuse myself from hearing the double recusal applications and the substantive motion, applicants" counsel submitted that I should direct, find or get another High Court judge ('judge') from another state to hear the double recusal applications and the substantive motion, as Abu Samah Nordin J, the other judge in Melaka, is currently on medical leave.

[15] In response it was submitted by learned counsel Miss Sathya Kumardas for the first respondent that one judge cannot direct another judge. Respective learned counsel for all the other respondents had associated themselves with this submission for the first respondent.

[16] The above submissions remind me of the case, ie *Her Majesty's Attorney-General v Felling* [2006] 1 FLR 93 QBD, where the Attorney-General applied for *inter alia* an order of committal in respect of what was said to be a grave contempt of court, perpetrated by the defendant. The defendant called for Laws LJ, one of the judges hearing the committal proceedings, to recuse himself, on the basis of actual or perceived bias against the defendant. The defendant submitted that the court should adjourn the proceedings so that he might apply to another judge, or another constitution of the court, for a determination of the question whether Laws LJ should stand down and take no further part in the case. On this issue, Laws LJ in para 5 of the judgment held where relevant as follows:

> ... to adjourn the case for another judge to decide the question is more likely to be more injurious to the doing of justice and so far as we know, has never been the practice. If it were the practice, it would mean that proceedings would be liable to adjournment, and thus

A delay, in every case where an application for a judge's recusal was made, … In particular, the court's process would be open to manipulation and contrived delay at the hands of disaffected litigants.

[17] Be that as it may, I am of the view that in our High Courts, all judges B (including judicial commissioners) are vested with co-ordinate jurisdiction. One of the legal effects of this co-ordinate jurisdiction is that judge A has no jurisdiction to direct, find or get judge B, less so from another state, to hear a cause or matter which has been filed and registered for hearing before judge A. In the same vein, judge B has no jurisdiction to make an order which is intended to recuse judge A from hearing any matter which has been filed and registered for hearing before judge A. C This principle applies whether the judges are resident in the same state or different states. Only the Chief Judge is conferred with the power and jurisdiction relating to the distribution of business among the judges and that is regulated by s 20 of the Courts of Judicature Act 1964.

D **[18]** A reference hereinafter to a section is a reference to that section in the Courts of Judicature Act 1964 unless otherwise stated.

[19] Under s 20, such distribution shall be made in accordance with such directions, which may be of a general or particular nature, as may be given by the E Chief Judge (see eg *Chong Siew Choong v Public Prosecutor* [1996] 5 MLJ 65 at pp 70I–71G per Abdul Malik Ishak J; *Amanah Finance Malaysia Berhad v Aura Vista Sdn Bhd & Ors* [2000] 5 CLJ 229 at p 233d–e per Abdul Wahab Patail J; *Public Prosecutor v Miswadi Radol & Ors* [1996] 3 CLJ 763, at p 766e–f per Abdul Malik Ishak J; *Malacca Securities Sdn Bhd v Lake Yu* [1999] 6 MLJ 112 at p 123E per Augustine Paul J (now FCJ); *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* F [1999] 4 MLJ 637 at pp 644–645 per Gopal Sri Ram JCA; *Paruvathy a/l Palany v Sathiasealan a/l Govindasamy* [1999] 5 MLJ 151 at p 171; and *Lee Chan Leong v Jurutera Konsultant (SEA) Sdn Bhd & Ors* [2002] 3 MLJ 718 at p 723per Gopal Sri Ram JCA) Hence, only the Chief Judge has the power and jurisdiction to embark upon the distribution exercise for the purpose of directing, eg judge B to hear any G matter filed and registered for hearing before judge A.

[20] I would with the utmost respect add that the direction(s) given by the Chief Judge pertaining to distribution under s 20 is of an administrative nature as opposed to a judicial order. Such administrative direction is generally effected where e.g. there H has been no appeal to the Court of Appeal.

[21] Where a judgment or order from the High Court has proceeded by way of appeal to the Court of Appeal, then respectfully, I am of the view that s 20 would be inapplicable. Instead, ss 67(1), 69(2) and (4) would apply.

I **[22]** Section 67 confers upon the Court of Appeal the jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter.

[23] Under s 69(1), appeals to the Court of Appeal shall be by way of re-hearing, and s 69(4) gives the Court of Appeal the power to give any judgment, and make any order which ought to have been given or made, 'and make such further or other orders as the case requires'.

[24] Hence, applying ss 67(1), 69(1) and (4) to an appeal preferred before the Court of Appeal, the order which the Court of Appeal makes pursuant thereto is a judicial order. It is within the jurisdiction of the Court of Appeal under s 69(4) to give direction upon the determination of the appeal before it. Such jurisdiction includes the making of such further or other orders as the case requires, eg the jurisdiction to give direction as to whether, given the above factual background, another judge or I should hear the substantive motion. This direction may be given by the Court of Appeal at the time of disposing of the appeal before it or subsequently by way of additional direction or clarification. See *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, Proposed Intervenors)* [2004] 3 MLJ 301 at p 321 per Gopal Sri Ram JCA, in delivering a dissenting judgment in the Court of Appeal; *Assahari bin Daud v Meriam bte Ishak & Ors* [2005] 3 MLJ 143 at p 152 per Abdul Kadir Sulaiman JCA (later FCJ) in delivering the judgment of the Court of Appeal; *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710 at p 726 per Gopal Sri Ram JCA in delivering judgment of the Court of Appeal; and the cases cited therein; and *Menara Panglobal Sdn Bhd v Arokianathan Sivapiragasam* [2006] 3 MLJ 493, CA at p 507 per Mohd Ghazali Yusoff JCA.

[25] In the circumstances, there can be no doubt that it is beyond my jurisdiction to make an order directing, finding or getting another judge, either in the same state or from another state, to hear the double recusal applications and the substantive motion.

SAME COURT OF APPEAL PANEL

[26] Applicants' counsel stressed that it is unprecedented for him to make an application to the same panel of the Court of Appeal to obtain an order whether another judge or I should hear the substantive motion, and repeated that I should make an order to recuse myself from hearing the double recusal applications and the substantive motion. Applicants' counsel relied on *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132, CA; and *Dato" Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, FC.

[27] The stand taken respectively for all the respondents was that it is normal for parties to seek an order by way of additional direction or clarification as to which judge should hear the substantive motion.

[28] As I have opined above, where the applicants and/or their counsel are desirous of seeking an order to recuse me from hearing the substantive motion, they should have, at the time of the determination of their appeal by the Court of Appeal, immediately sought an order or direction from that court as to which particular judge should hear the substantive motion.

Although the applicants and/or their counsel had not done so in the Court of Appeal at that time, they are not precluded from doing so, even some seven months later. It is only fitting and proper for them to seek an order, direction or clarification from the same panel of the Court of Appeal as to which particular judge should hear the substantive motion.

[29] Having had the advantage of an advanced and analytical reading and understanding of the double recusal applications, as explained earlier, I had earnestly wished that it would have been possible for me to offer a practical approach and solution by offering the three options above, in particular option (1) as there can be no doubt that the Court of Appeal is the proper forum to decide on the particular judge who should hear the substantive motion.

[30] One has to appreciate the nature and content of the double recusal applications. The oral application seeks to recuse me from hearing encl (33), and encl (33) in turn seeks to recuse me from hearing the substantive motion. In the double recusal applications, I have been made the subject matter, in which the order sought to be made by me, ie either to recuse myself or to refuse to recuse myself, would require me to be a judge of my own cause. In other words, I would have to be a judge of my own partiality or impartiality. That would most certainly contravene one of the two fundamental pillars of natural justice ie *nemo debet esse judex in propria causa* (no one should be a judge in his own cause).

[31] In *Bumicrystal Technology (M) Sdn Bhd v Rowstead Systems Sdn Bhd* [2004] 6 MLJ 169, HC, there was an application by the defendant for Mohamad Apandi Ali JC (now J) to recuse himself from hearing the case, on the ground of a possibility of bias. His Lordship heard and dismissed the defendant's application, finding that there was no reasonable reason or excuse to recuse. The defendant lodged an appeal and meanwhile applied, in the Court of Appeal, for stay of proceedings before the High Court, pending the decision on the appeal in the Court of Appeal. At the hearing of the stay application in the Court of Appeal in *Rowstead Systems Sdn Bhd*, Azmel Maamor J (now JCA) in delivering the judgment of the Court, granted the stay. His Lordship posed the more important question and answered the same at p 471*a-c* as follows:

> ... But the more important question to be asked is whether it is proper for such decision to be made by the presiding judge against whom bias has been alleged? In other words, when a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, would such decision not infringe the rule of natural justice in that 'one should not be a judge in one's own cause'. This, we think, is the crux of the instant case …

[32] Meanwhile, I am also mindful of the observation of Abdul Hamid Mohamad FCJ in *Dato" Tan Heng Chew* at p 592 in para 31 to the effect that the court should be vigilant not to allow parties to do 'judge-shopping' by recusal of judges.

[33] In my view, *Dato' Tan Heng Chew*, FC and *Rowstead Systems Sdn Bhd*, CA cited by the applicants' counsel do not support his contention that in the double recusal applications I should make an order to recuse myself or conversely not to recuse myself.

ABUSE OF PROCESS OF COURT

[34] All the above submissions presented for the respective parties would require me to address the question of whether the double recusal applications would constitute a category of abuse of the process of the court.

[35] As in the law of contempt of court and the law of negligence, the circumstances and categories which may arise in a particular case and which may constitute an abuse of the process of the court are never closed. Since the scope for development is limitless, it is neither possible nor prudent to provide a formula or an exhaustive list to cover the infinite categories.

[36] I am in no position to speculate on the motive of the applicants' counsel in making and filing the double recusal applications, when the obtaining of an order from me to recuse myself or to refuse to recuse myself, would in either event contravene the aforesaid rule of natural justice. Further, as analysed above and conceded by all the respective counsel for the respondents, there is a proper and appropriate forum, ie the same Court of Appeal panel to give the requisite direction or clarification which would have provided an authoritative answer to the double recusal applications. In my view, the double recusal applications are obvious illustrations of abuses of the process of the court, and such abuses are capable of being struck out.

[37] In *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, Peh Swee Chin SCJ (as he then was) in delivering judgment of the Supreme Court at p 23I made it absolutely clear that the High Court always has an inherent jurisdiction to prevent an abuse of its process irrespective of whether or not it is expressly called for in an application under O 18 r 19.

[38] I would in all humility add that O 92 r 4 expressly provides for the inherent powers of the High Court to deal with an abuse of the process of the court, in the following words:

> 4 Inherent powers of the Court (O 92 r 4)
>
> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

(See eg *Leong Kum Whay* at p 726 per Gopal Sri Ram JCA).

A CONCLUSION

[39] On the foregoing grounds, I hereby strike out the double recusal applications, being abuses of the process of the court, with costs to all the respondents.

B *Both recusal applications struck out.*

Reported by John Paul Simon

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